LOH SEK NGEE v. PUBLIC PROSECUTOR.

[Court of Appeal (Mathew, C.J., Pretheroe and Wilson, JJ.) Kuala Lumpur, February 4, 1952]

Emergency Regulations, 1948 — Regulation 4(1)(a) and (b) — Carrying arms — Sentence of death — Right of appeal.

The appellant in this case was convicted, on his own plea, of three offences, (1) carrying a revolver contrary to Regulation 4(1) (a) of the Emergency Regulations, (2) possession of six rounds of ammunition contrary to Regulation 4(1)(b), and (3) possession of a hand grenade contrary to Regulation 4(1)(b). The learned trial Judge sentenced the accused to death on the first charge and deferred sentence on the other two charges. The point for determination was whether the appellant had a right of appeal to the Court of Appeal.

Held, that a convicted person has a right of appeal to the Court of Appeal against sentence even though the only sentence provided by law is death.

CRIMINAL APPEAL.

The Judgment of the Court of Appeal was delivered by :—

Mathew, C.J. : — The appellant in this case was convicted, on his own plea, of three offences, (1) carrying a revolver contrary to Regulation 4(1) (a) of the Emergency Regulations, (2) possession of six rounds of ammunition contrary to Regulation 4(1) (b), and (3) possession of hand grenade contrary to Regulation 4(1) (b). The learned trial Judge sentenced the accused to death on the first charge and deferred sentence on the other two charges. The first point for determination is whether the appellant has a right of appeal to this Court.

Regulation 12 of the Emergency (Criminal Trials) Regulations, 1948, requires the presiding Judge, immediately after passing sentence in an Emergency Procedure case, to ask the convicted person if he wishes to appeal against his conviction or sentence or both, and a note of a reply to such question shall be entered in and form part of the record. Under the proviso to this regulation this procedure shall not be followed in a case where no sentence other than death is provided by law and the accused has been convicted on his own plea. This regulation is purely procedural and in no way affects the rights of a convicted person to appeal. There are no other relevant provisions regarding appeals in Emergency Procedure cases, and appeals in such cases are therefore governed by section 19 of the Courts Ordinance (No. 43 of 1948). Sub-section (2) of this section provides :—

"An appeal by a person convicted shall be either against the conviction or against the sentence or against both:

Provided that where an accused person has pleaded guilty and been convicted on such plea there shall be no appeal except as to the extent or legality of the sentence."

In our view a convicted person has a right of appeal to the Court of Appeal against sentence even though the only sentence provided by law is death. The appellant in this case has urged in mitigation of sentence that he had assisted the Police after his arrest. These are matters which it is not competent for us to consider. The only sentence provided by law for an offence contrary to Regulation 4(1) (a) of the Emergency Regulations is death.

The appeal against sentence is dismissed.

Appeal dismissed.

PUBLIC PROSECUTOR v. GOH THOR KIAH.

[App. Crim. Juris. (Taylor, J.) February 22, 1952]

[Selangor — Criminal Appeal No. 69 of 1951]

Criminal Procedure Code (Cap. 6). s. 314 — The word "shall" appearing in s. 314(ii) — Construction of.

This was an appeal by the Public Prosecutor. The respondent in this case was charged in the Sessions Court with possession of some 20 packets of opium. He pleaded guilty and was discharged under section 173A of the Criminal Procedure Code. When the appeal first came before Taylor, J., no notice of any kind that an appeal was pending had been served on the respondent. The Public Prosecutor applied under section 314(ii) for a notice to be issued; this was done and it was returned unserved. Section 314(ii) reads:

"(ii) If the service of such last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence."

The learned Deputy Public Prosecutor applied under the above sub-section for the appeal to be heard on the merits in the absence of the respondent.

Held, that originally there was no appeal by the Public Prosecutor; the Chapter was framed on the view that he would be the respondent and provision is made for the record to be transmitted to him by way of service but without being actually served. Much later, the Code was amended to permit of an appeal on the merits by the Public Prosecutor but section 314 was not amended; therefore an appeal by the Public Prosecutor cannot be heard in the absence of the respondent.

The word "shall" is construed with a qualification to avoid infringing a fundamental principle.

CRIMINAL APPEAL.

D. M. K. Grant (D.P.P.) for the appellant.

Respondent — absent, unserved.

Cur. Adv. Vult.

Taylor, J. : — This is an appeal by the Public Prosecutor against a sentence or order which he says was inadequate.

The accused was charged in the Sessions Court with possession of some twenty packets of opium. He pleaded